BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANK W. A. PERRY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,010,714
FORT SCOTT COMMUNITY COLLEGE	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOC. OF SCHOOL BOARDS	)	
WC FUND, INC.	)	
Insurance Fund	)	

ORDER

Claimant appealed the January 27, 2004, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

Claimant requests workers compensation benefits for injuries he allegedly received on April 7, 2003, when he was allegedly assaulted and battered by a fellow employee. In the January 27, 2004, Preliminary Decision, the Judge denied claimant's request for benefits, finding the confrontation resulted from personal animosities that were not related to the employment with respondent.

Claimant contends Judge Foerschler erred. Claimant argues his claim is compensable as respondent knew there was a problem between claimant and the fellow employee who allegedly assaulted him as claimant had allegedly advised his immediate supervisor that he had been threatened. Accordingly, claimant argues respondent took no action to prevent the April 7, 2003, incident and, therefore, his injuries arose from respondent's inaction. In support of that theory of liability, claimant cites the *Harris*[1] decision.

[1] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

Conversely, respondent and its insurance fund request the Board to affirm the Preliminary Decision. They contend claimant did not tell his supervisor of the alleged threats before the altercation and, therefore, respondent had no reason to anticipate an assault. Consequently, they argue the *Harris* decision does not apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant contends that on April 7, 2003, while working for respondent, a fellow employee lifted him by the throat and bent him over a railing, which injured his back and neck. Claimant testified that before the incident he had advised his immediate supervisor on two separate occasions that the fellow employee had threatened to kill claimant. Claimant further testified that on those two occasions when he reported the threats he also advised that the fellow worker was threatening him daily with physical injury.

On the other hand, claimant's supervisor testified he did not recall either of those conversations.

Judge Foerschler denied claimant's request for benefits, stating:

> Following a preliminary hearing on July 24, 2003, this matter was continued until a police report of the incident and some additional medical records of Claimant could be provided. Finally an order for the production of the police report was issued and has been answered by the City of Fort Scott, enclosing the report. This has been reviewed along with the transcript of the hearing. It is concluded from this evidence at this time that any injury suffered by Mr. Perry on the occasion was purely [t]he result of personal relations between him and Mr. Meiner *[sic]* and was not in anyway *[sic]* related to this *[sic]* work for the Community College and therefore not compensable.[2]

In his brief filed with the Board, claimant cites the *Harris* decision and argues that his claim is compensable as respondent was aware of the threats the fellow employee had made against him but did nothing to prevent an altercation. In *Harris*, the Kansas Court of Appeals held, in part:

> If an employee is assaulted by a fellow worker, whether in anger or in play, an injury so sustained does not arise "out of the employment" and the injured employee is not entitled to workers compensation benefits **unless the employer had reason to**

[2] ALJ Preliminary Decision (Jan. 27, 2004).

> **anticipate that injury would result if the two employees continued to work together.**[3] (Emphasis added.)

Unfortunately, there is no indication in the preliminary hearing transcript or the Judge's administrative file that claimant ever presented that theory of liability to the Judge. As a consequence, the Judge did not address that theory in the Preliminary Decision. Moreover, whether claimant advised his supervisor of the alleged threats in advance of the assault and whether respondent had knowledge of such an intense animosity between claimant and the alleged attacker hinge on whether claimant or his supervisor is the more credible.

The Board concludes claimant's current theory of liability was not presented to the Judge and, therefore, this claim should be remanded for the Judge to address the related issues.

WHEREFORE, the Board remands this claim to Judge Foerschler to address claimant's contention that this claim is compensable under the principles set forth in *Harris*. The Board does not retain jurisdiction of this appeal.

IT IS SO ORDERED.

Dated this ____ day of March 2004.

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Elizabeth Reid Dotson, Attorney for Respondent and its Insurance Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[3] *Harris*, 21 Kan. App. 2d 804, Syl. ¶ 2.